87-1991 (1)

No.

In the Supreme Court of the United States

OCTOBER TERM, 1987

ROY GUINNANE, GUINNANE CONSTRUCTION CO., INC.
Petitioners,

V.

CITY AND COUNTY OF SAN FRANCISCO,
ROBERT PASSMORE AND ALEC BASH
Respondents.

Petition for Writ of Certiorari to the Court of Appeal of The State of California

CHARLES O. MORGAN, JR.
Law Offices of Charles O. Morgan, Jr.
450 Sansome Street
Suite 1310
San Francisco, CA 94111
Telephone: (415) 392-2037

Attorneys for Petitioners

27 pp

QUESTION PRESENTED

Whether plaintiffs are entitled to recover damages for a taking of property following the decision in *First English Evangelical Lutheran Church of Glendale v. Los Angeles County* where defendants' activities prevented development of the subject property.

LIST OF PARTIES
RULE 28.1

The parties to the proceedings below were the petitioners Roy Guinnane and Guinnane Construction Co., Inc., and the respondents City and County of San Francisco, Robert Passmore and Alec Bash.

TABLE OF CONTENTS

Page

Questions presented i
List of parties ii
Opinions below 2
Jurisdiction 2
Statute involved 2
Statement of the case 3
Reasons for granting the writ 7

I

THE COURT OF APPEAL'S DECISION CONFLICTS WITH THE CONTROLLING DECISIONS OF THIS COURT AND ALLOWS A TAKING OF LAND WITHOUT JUST COMPENSATION 7
Conclusion 9
Appendix (Opinion of the Court of Appeal and Order Denying Review After Judgment By The Court of Appeal A-1

TABLE OF AUTHORITIES CITED

Cases

Page

Agins v. City of Tiburon, 24 Cal.3d 266, affd. 447 U.S. 255 (1979) 6

First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 482 U.S. ____, 96 L.Ed.2d 250, 197 S.Ct. 2378 (1987) 6, 9

Penn. Central Transp. Co. v. New York City, 438 U.S. 104 (1978) 6, 8

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 6

Constitution

United States Constitution:

Amendment V 2

Amendment XIV 3

Statute

28 U.S.C. sec. 1257(3) 2

No.

In the Supreme Court of the United States

OCTOBER TERM, 1987

ROY GUINNANE, GUINNANE CONSTRUCTION CO., INC.
Petitioners,

V.

CITY AND COUNTY OF SAN FRANCISCO,
ROBERT PASSMORE AND ALEC BASH
Respondents.

Petition for Writ of Certiorari to the Court of Appeal of The State of California

The petitioners Roy Guinnane and Guinnane Construction Co., Inc. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California, First Appellate District, Division One, entered in the above-entitled proceeding on November 19, 1987.

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, First Appellate District, Division One, dated November 19, 1987, is reported at 197 Cal. App.3d 862 and appears in Appendix A hereto. The Order Denying Review After Judgment By The Court of Appeal of the California Supreme Court, dated February 3, 1988, is unreported and appears in Appendix B.

JURISDICTION

The California Supreme Court on February 3, 1988 denied review after the November 17, 1987 decision of the Court of Appeal. The petition for certiorari was filed within 90 days of the California Supreme Court's denial of review. This Court's jurisdiction is invoked under 28 U.S.C. sec. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness

> against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV.

> Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In June, 1979, petitioners Roy Guinnane and Guinnane Construction Co., Inc. (hereinafter collectively "Guinnane") purchased for $210,000.00 four parcels of real property located on Edgehill Way in the City and County of San Francisco with the intention to eventually build a single family residence on each lot. At the time, Guinnane was not aware of any intention to condemn the property and would not have purchased the property had he known.

Approximately one year later, on July 1, 1980, at a joint meeting of the respondent City and County of San Francisco's (hereinafter "City") Recreation and Park Commission and respondent Planning Commission, the latter adopted Resolution No. 8615 amending the Recreation and Open

Space Element of the Master Plan of City to include as open space an area identified as "Edgehill Woods," containing Guinnane's property.

Although no funds were allocated to acquire the property, the mere designation of Guinnane's property for acquisition as Open Space meant that *any* construction of the property would automatically be in conflict with the Master Plan of the City, thereby requiring environmental review beyond that necessary for other property in the area. The designation also meant that the City would prohibit all construction on the subject property, regardless of the amount of environmental review.

On September 4, 1980, Guinnane filed a building permit application for the construction of a single family dwelling. On November 4, 1980, respondent Robert Passmore, Assistant Director of Planning Department – Implementation, determined that an Environmental Impact Report (hereinafter "EIR") was required on the property because the proposed construction conflicted with the City's Master Plan.

City on July 7, 1981, decided to delete Guinnane's property from the Open Space Element of the Master Plan, thereby eliminating the sole basis for the EIR requirement.

Although City stated in Resolution 9277 that lack of funds caused the deletion, it appears that City determined that Guinnane's property was simply not suitable for open space acquisition, though there had been no change in the property since the original designation.

Despite this negation of its only basis for the EIR requirement, the City did nothing to prevent further work on PDEIR. The City did not decide that *any* development was even possible on the subject property until December 10, 1981, when the Planning Commission adopted Resolution No. 9257, allowing building permit applications to be processed on property designated for Open Space acquisition which was not going to be purchased.

It was not until March 4, 1982 that the City finally determined that a Negative Declaration, rather than an EIR, would be required.

Rather than easing the review, however, the City effectively raised an insurmountable barrier by simultaneously requiring that Guinnane include in his Negative Declaration a discussion of an adjoining landowner's project. This requirement was imposed by respondent Alec Bash, although he knew that Guinnane and Borak (the adjoining landowner) would not work together, that Borak refused to pay the cost of any additional work, and that Borak's attorney had threatened the City with a lawsuit if he were required to provide any environmental document.

In April, 1982, Guinnane brought suit for inverse condemnation, violation of civil rights, conspiracy, and a writ of mandate against respondents City, Passmore and Bash.

Since the filing of the lawsuit, respondent City has continued to impose a series of unreasonable requirements on Guinnane, effectively preventing him from completing environmental review and obtaining approval of his building permit application. For example, the City then imposed a new requirement that Guinnane meet with City's Fire Department, but the Fire Department refused to meet with Guinnane on advice of the City Attorney.

On or about May 26, 1983, respondent City without notice cancelled Guinnane's building permit application. As a result of respondents' actions, the property currently has no value.

Prior to trial respondents moved for summary judgment on all causes of action. The Honorable Raymond D. Williamson, Jr. granted the motion on February 4, 1986 and, on February 19, 1986 entered judgment in favor of respondents.

Guinnane timely appealed from the judgment to the Court of Appeal, First Appellate District, of the State of California. In an opinion filed November 19, 1987 and included herein as

Appendix A, Presiding Justice Racanelli of Division One affirmed the judgment.

Thereafter, Guinnane timely petitioned the California Supreme Court for review of the Court of Appeal's decision. The California Supreme Court on February 3, 1988 filed its Order Denying Review After Judgment By the Court of Appeal, which is included herein as Appendix B.

The Court of Appeal acknowledged that recovery for inverse condemnation is not limited to a direct physical invasion – "taking" may also occur when a land use regulation "goes too far." Opinion, Appendix A at A-3, quoting *Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393, 415.

The Court of Appeal further acknowledged that this Court in *First English Evangelical Lutheran Church of Glendale v. Los Angeles County* (1987) 482 U.S. ___, 96 L.Ed.2d 250, 107 S.Ct. 2378 had held that damages were recoverable for a temporary, regulatory taking, thereby overruling California law that had precluded damage recoveries in claims for regulatory takings. *Agins v. City of Tiburon* (1979) 24 Cal.3d 266, affd. 447 U.S. 255.

In its opinion, however, the Court of Appeal distinguished *First English* on the grounds that this Court in *First English* had assumed a taking had occurred by accepting as true an allegation that the ordinance at issue had denied the landowner all use of his property. Opinion, Appendix A at A-6.

In this case, the Court of Appeal determined that Guinnane did not establish that a taking occurred. *Id.* Relying on *Penn. Central Transp. Co. v. New York City* (1978) 438 U.S. 104, 131, the Court of Appeal reasoned that, in cases where a regulation has diminished the value of property, the inquiry should focus on the uses permitted under the regulation and:

> Plaintiff cannot contend he was denied all use of his property. He was neither deprived of his

> right to exclude others from his land nor denied the right to sell the property.
>
> Opinion, Appendix A, at A-7.

The Court of Appeal further determined that plaintiff's claim that he was denied the right to develop his property was premature because there had been no final action on a second building permit application as of the time of the summary judgment. Opinion, Appendix A, at A-7. Since the City no longer intended to acquire the property, Guinnane at most had a claim for a temporary taking. *Id.* at A-8.

Finally, the Court of Appeal found that the 5-year delay in acting upon plaintiff's original application was either an example of noncompensable "normal delays in obtaining building permits," Id. at A-9 (quoting *First English*, 107 S.Ct. at 2389) or attributable to Guinnane. Opinion, Appendix A, at A-11-12.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEAL'S DECISION CONFLICTS WITH THE CONTROLLING DECISIONS OF THIS COURT AND ALLOWS A TAKING OF LAND WITHOUT JUST COMPENSATION

A review of *Penn. Central Transportation Co. v. New York City* (1978) 438 U.S. 104, 131, upon which the First Appellate District Court of Appeal relies for its reasoning, illustrates the extreme interpretation of the law set forth in the Opinion. The uses permitted under the regulation at issue in *Penn Central* included the operation of a busy railroad terminal containing office space and concessions. Although the landowner contended its right to develop the air rights above the terminal had been taken, there was no suggestion that any

and all construction above the terminal was prohibited, and the regulation transferred development rights to other property in the area. There was, therefore, no taking. *Penn. Central*, 438 U.S. at 136-37.

By contrast, *no* development was allowed on Guinnane's property from September, 1980 to December, 1981, as the Court of Appeal acknowledges in its Opinion, Appendix A, at A-3.

Although the Court of Appeal is correct in stating that Guinnane could exclude others from the land, there is no explanation as to what value Guinnane's right to exclude others from his land would be to him. The land was completely undeveloped open space, which is why the City wanted it for a park. There is nothing in the record to indicate that Guinnane ever intended to develop his property into a park. The Court of Appeals' implicit assumption that Guinnane has "use" of his property simply because the public cannot freely invade his vacant lot ignores entirely this Court's long-standing rule that a:

> statute that substantially furthers public policies may so frustrate distinct investment-backed expectations as to amount to a taking.
>
> *Penn. Central*, 438 U.S. at 127.

Finally, although in theory Guinnane did have "the right to sell the property," City's activities had deprived the subject property of all value. The Court of Appeal acknowledged but ignored Guinnane's contention that the property had no value. Opinion, Appendix A, at A-8, n.3.

The Court of Appeal also ignored the rationale of *First English Evangelical Lutheran Church v. County of Los Angeles* (1987) 482 U.S. ___, 96 L.Ed.2d 250, 107 S.Ct. 2378. Although this Court distinguished cases in which

"normal delays" in obtaining permits resulted, where an ordinance:

> denied appellant all use of its property for a considerable period of years, . . . we hold that invalidation of the ordinance without payment of fair value for the use of the property during this period of time would be a constitutionally insufficient remedy.
>
> *First English*, 96 L.Ed.2d. at 268.

Guinnane has not received fair value for the period during which all acknowledge he could not develop his property. Disputes exist as to responsibility for continuing delays thereafter. This Court must not allow the Opinion of the Court of Appeal to undermine the holding and spirit of *First English.*

CONCLUSION

For all the above reasons, this Court should issue a writ of certiorari to review the judgment of the Court of Appeal.

Respectfully submitted,

Charles O. Morgan, Jr.
Counsel for Petitioners

APPENDIX A

[197 Cal. App.3d 862]
[No. A034516, First Dist., Div. One, Nov. 19, 1987]

ROY GUINNANE et al.,
Plaintiffs and Appellants,

v.

CITY AND COUNTY OF SAN FRANCISCO et al.,
Defendants and Respondents.

OPINION

RACANELLI, P.J. – Plaintiffs and appellants,[1] real estate developers, brought an inverse condemnation action against defendants on a theory that the city's conduct in delaying action on a building permit application to construct four single-family houses on four adjoining lots, pending environmental review, was so unreasonable as to amount to a taking without just compensation. Following an order granting summary judgment in favor of the city, plaintiff appeals.

---

[1]Since the interests of plaintiffs and appellants are identical, we will refer to them hereafter in the singular for convenience.

FACTUAL BACKGROUND

In 1979, plaintiff Roy Guinnane purchased four vacant lots located on Edgehill Way in San Francisco. In July 1980, the recreation and parks commission and the planning commission, acting jointly, designated an area known as "Edgehill Woods," which included plaintiff's lots, for study for possible acquisition as a city park. Accordingly, Edgehill Woods was included in the recreation and open space element of the city's master plan.

In September 1980, plaintiff filed an application for a building permit. The "environmental evaluation" submitted with the permit application revealed plaintiff's intent to build four single-family houses on the lots. After an initial study, the city's planning department concluded the construction might have significant environmental effects and required an environmental impact report (EIR).[2] Thereafter, plaintiff hired a consultant to prepare a preliminary draft EIR, which ultimately was submitted in September 1981.

In October 1981, after a year-long study, the recreation and parks commission and the planning commission decided to acquire only a portion of Edgehill Woods; the area to be acquired did not include plaintiff's lots.

In December 1981, the planning commission amended the master plan to allow construction projects on lots which were not to be acquired. On January 14, 1982, the planning commission rescinded its requirement of an EIR for plaintiff's proposed development.

The planning commission's rescission of the EIR requirement for plaintiff's proposed development was conditioned upon another initial study. Following the initial

---

[2]The planning commission upheld the decision of the planning department on plaintiff's administrative appeal.

study, the planning department concluded an EIR was not required but that a negative declaration was indicated. In that regard, the planning department requested plaintiff to submit certain information in support of the negative declaration. However, plaintiff failed to submit all of the requested information until more than *three years later* in September 1985.

On October 18, 1985, the city issued a negative declaration, amended in November in response to public comments.

Meanwhile, plaintiff filed his lawsuit in 1982, long before the city's environmental review was completed in November 1985. Due to plaintiff.s failure to submit the requested data, plaintiff's building permit application had been cancelled in 1983. On December 30, 1985, plaintiff filed a new application. At the time city's motion for summary judgment came on for hearing (February 1986), plaintiff's new building permit application had not yet been acted upon.

DISCUSSION

I.

It has long been established that inverse condemnation is not limited to a direct physical invasion. A "taking" may occur when a land use regulation "goes too far." (*Penna. Coal Co. v. Mahon* (1922) 260 U.S. 393, 415.) At the time of the proceedings below, California law declared that a landowner could not maintain a suit for *damages* resulting from a regulatory taking; that the landowner's remedy was limited to an action for mandamus or declaratory relief to invalidate and remove the challenged regulation. (*Agins v. City of Tiburon* (1979) 24 Cal.3d 266, affd. 447 U.S. 255.)

Given that settled law, plaintiff could not, and did not, assert a regulatory taking. Instead, plaintiff sought to rely on

the rule announced in *Klopping v. City of Whittier* (1972) 8 Cal.3d 39, that a landowner may recover damages for unreasonable precondemnation activities. Such reliance was wholly misplaced.

In *Klopping*, the city first initiated eminent domain proceedings against plaintiffs' property, then dismissed the action announcing its intention to condemn the property in the future. Plaintiffs sued in inverse condemnation alleging that as a result of the city's announced intention, a cloud was placed over the property resulting in loss of rentals and diminution of the value of the property. The *Klopping* court held that under such circumstances the landowners could maintain an action for inverse condemnation compelling the city to proceed with its announced intention to condemn and to pay the landowners the market value of the property *before* the cloud was created and the value declined. (8 Cal.3d at p. 52.)

Plaintiff seems to suggest that city's delay in acting upon his application constituted unreasonable precondemnation activities. But plaintiff overlooks a fundamental distinction between this case and *Klopping*: unlike *Klopping* there was never any announcement by the city of an intention to condemn plaintiff's property. At most, the property was properly designated as open space within the master plan, to be *studied* for *possible* acquisition as a public park.

Of course, a planning designation is not the functional equivalent of an announced intent to condemn. Thus, in *Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, the court held that a general plan designation of plaintiff's property as a street did not give rise to an action for inverse condemnation.

> "The plan is by its very nature merely tentative and subject to change. Whether eventually any part of plaintiff's land will be taken for a street depends

> upon unpredictable future events. If the plan is implemented by the county in the future in such manner as actually to affect plaintiff's free use of his property, the validity of the county's action may be challenged at that time."
>
> (*Id* ., at p. 118.)

The *Selby* court noted the basic difference from *Klopping* in concluding that the adoption of a general plan is "several leagues short of a firm declaration of an intention to condemn property." (*Selby Realty Co. v. City of San Buenaventura, supra,* 10 Cal.3d at p. 119.) Moreover, the court reasoned,

> "If a governmental entity and its responsible officials were held subject to a claim for inverse condemnation merely because a parcel of land was designated for potential public use on one of these several authorized plans, the process of community planning would either grind to a halt, or deteriorate to publication of vacuous generalizations regarding the future use of land."

(*Id.*, at pp. 120-121; see also *Cambria Spring Co. v. City of Pico Rivera* (1985) 171 Cal.App.3d 1080, 1097-1098 [adoption of redevelopment plan]; *Dale v. City of Mountain View* (1976) 55 Cal.App.3d 101, 107 [amendment to general plan to restrict user of property to open space]; *Navajo Terminals, Inc. v. San Francisco Bay Conservation etc. Com.* (1975) 46 Cal.App.3d 1 [adoption of resolution establishing property as a park].)

In the present case, we are likewise compelled to conclude that the city's designation of plaintiff's property as a site to be studied for possible acquisition as a public park did not

amount to an announced intention to condemn so as to justify an action in inverse condemnation.

II.

After the briefs were filed in the present case, the U.S. Supreme Court decided *First English Evangelical Lutheran Church of Glendale v. Los Angeles County* (1987) 482 U.S. ___, [96 L.Ed.2d 250, 107 S.Ct. 2378] (hereafter *First English*).In that case the Supreme Court overruled the California Supreme Court's decision in *Agins v. City of Tiburon. supra*, 24 Cal.3d 266, and held damages were recoverable for a regulatory taking even if the taking is temporary. In a supplemental brief filed with this court, plaintiff now argues that he need no longer rely on *Klopping* for his claim for damages and bases his claim for damages on the traditional theory of a regulatory taking as discussed in *First English*. Our analysis of such alternate theory of recovery yields a result unfavorable to plaintiff.

Although the Supreme Court has determined that a temporary regulatory taking is compensable, there is nothing in *First English* which changes the rule that a "taking" must occur before compensation may be claimed. In *First English,* the court *assumed* a taking had occurred. On the appeal from the trial court's order striking a portion of the complaint, the lower court and the Supreme Court *accepted as true* the allegation that the county's ordinance denied the landowner *all* use of the property. Thus, the court framed the issue before it as "whether abandonment by the government requires payment of compensation for the period of time during which regulations deny a landowner *all use* of his land." (*First English, supra,* 107 S.Ct. at p. 2387, emphasis added.) The court remanded the matter for further proceedings on whether a regulatory taking had actually occurred: "whether the

ordinance at issue actually denied appellant all use of its property or whether the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as a part of the State's authority to enact safety regulations." (*Id.*, at pp. 2384-2385.)

Here, in contrast, plaintiff did not establish that a taking occurred. The United States Supreme Court has never developed a "set formula to determine where regulation ends and taking begins." (*Goldblatt v. Hempstead* (1962) 369 U.S. 590, 594.) When, as here, the claim is made that the regulation has significantly diminished the property value,[3] the focus of the inquiry is on the uses of the property which remain. (*Penna Central Transp. Co. v. New York City* (1978) 438 U.S. 104, 131.) Plaintiff cannot contend he was denied *all* use of his property. He was neither deprived of his right to exclude others from his land nor denied the right to sell the property. Moreover, the record does not show whether any final action has been taken on his building permit application filed in December 1985. As earlier noted, no action had been taken by the city as of the time the summary judgment motion was heard. Consequently, plaintiff's assertion that he has been denied the right to develop the property is premature.[4] (*Williamson Planning Comm'n v.*

---

[3]The record discloses that plaintiff purchased the property for $210,000 and claims it is now valueless. However, plaintiff's expert appraiser valued the land at $1.5 million on the assumption it could be developed.

[4]The denial of plaintiff's application to build four 5-bedroom, 5-bath houses of 6,000 square feet each, if it has occurred, does not constitute a denial of all use of the land. The denial of an ability to exploit a property interest heretofore believed available for development is not a taking. (*Penna. Central Transp. Co. v. New York City, supra,* 438 U.S. at p. 130.) We are informed that during the pendency of this appeal, the city in fact did deny plaintiff's application. If he believes the denial was arbitrary

Footnote continued on next page.

Hamilton Bank (1985) 473 U.S. 172, 186-191; see also *MacDonald, Sommer & Frates v. Yolo County* (1986) 477 U.S. ___, [91 L.Ed.2d 285, 294-296, 106 S.Ct. 2561, 2566].) In such circumstances, plaintiff could not allege and prove a permanent taking of his property.

In any event, since the city decided *not* to acquire plaintiff's property for a public purpose, the "cloud" on the property was eventually removed. Insofar as plaintiff argues that he suffered a temporary taking during the city's study period, his theory is still unsound. There is no showing that the delay in the city's processing of plaintiff's permit application was anything more than the normal period of time for governmental decision making. Such an interim delay does not constitute a temporary taking.

We are guided by two high court decisions. First, in *Agins v. Tiburon* (1980) 447 U.S. 255, the city downzoned the plaintiffs' property, restricting the number of allowable residential dwellings. Before rezoning plaintiffs' property, the city had undertaken studies which recommended acquisition of plaintiffs' land for open space. After the rezoning, the city filed an eminent domain proceeding but eventually abandoned it. The plaintiffs' inverse condemnation theory of suit was rejected by the California Supreme Court. (*Agins v. City of Tiburon. supra*, 24 Cal.3d at p. 278.) And that determination was later upheld by the United States Supreme Court: "The State Supreme Court correctly rejected the contention that the municipality's good-faith planning activities, which did not result in successful prosecution of an eminent domain claim, so burdened the appellants' enjoyment of their property as to constitute a taking. See also *City of Walnut Creek v. Leadership Housing Systems, Inc.*, 73 Cal. App.3d 611, 620-

---

or unreasonable, plaintiff could elect to seek administrative mandamus relief.

624, 140 Cal. Rptr. 690, 695-697 (1977). Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended. *Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are 'incidents of ownership. They cannot be considered as a "taking" in the constitutional sense.'* [Citations.]" (*Agins v. Tiburon, supra*, 447 U.S. 255, 263, fn. 9, emphasis added.)

Although the United States Supreme Court in *First English* has now overruled the California Supreme Court's *Agins* decision on another point, there is nothing in *First English* which alters the established principle that the interim burden imposed on a landowner during the government's decision making process, absent unreasonable delay, does not constitute a taking.

Indeed, the *First English* court distinguished *Agins v. Tiburon, supra,* 447 U.S. 255, 263, on the ground that in contrast to the ordinance in *First English* which prohibited *all* building, "the preliminary activity [in *Agins*] did not work a taking." The *First English* court emphasized that the taking in the case before it was "quite different" (107 S.Ct. at p. 2384) from the situation involving "normal delays in obtaining building permits . . . ." (*Id.*, 107 S.Ct. at p. 2389.)

We therefore discern from *Agins* and *First English* that the temporary suspension of land use which occurs during the normal governmental decision making process does not constitute a taking. Accordingly, the interim delay which occurred herein while the city studied the possible acquisition of plaintiff's property as an open space area did not constitute a compensable taking.

III.

Plaintiff also asserts, however, that the city's delay in acting upon his application was not "normal," but rather excessive and unreasonable.[5] The argument finds no support in the record. Indeed, as the city correctly points out, any excessive delay was attributable solely to plaintiff's own conduct and inaction. Any delay attributable to the city was both reasonable and incidental.[6]

In short, the delays encountered in acting upon the permit application were directly attributable to plaintiff. The time attributable to the city's routine processing of the application cannot be described as either excessive or unreasonable.

---

[5]Not surprisingly, plaintiff does not contend that the city acted improperly in undertaking an environmental review before acting upon his building permit application. Under CEQA, the city's environmental review procedures were mandatory. (Pub. Resources Code, § 21000 et seq.)

[6]We recite the salient sequence of events: On September 4, 1980, plaintiff filed his building permit application; in November 1980, the city completed its initial environmental study and concluded the project may have a significant environmental impact; in April 1981, five months after the city requested an EIR, plaintiff's consultant first met to confer with city officials.

In September 1981, plaintiff submitted a preliminary draft EIR; in January 1982, the planning commission rescinded the EIR requirement pending another initial study.

In March 1982, the planning department completed its study and concluded that only a negative declaration would be required; the planning department then requested plaintiff to furnish data to enable the city to complete the negative declaration, including an analysis of the cumulative impact of hillside development, a site survey showing the trees to be removed, a report on fire-fighting problems, a soil test relating to problems of landsliding and a a transportation analysis. Notwithstanding city's repeated requests for the essential information, some three and one-half years expired before plaintiff submitted the final item of information (the site survey) in September 1985. The following month, city issued the negative declaration.

Finally, we reject plaintiff's argument that the issue of unreasonable delay should not have been decided on a motion for summary judgment. The material facts were undisputed. The only question was whether the city's conduct constituted "normal" as opposed to "excessive" delay in the processing of plaintiff's permit application. That question became one of law properly decided in a summary judgment proceeding. (See *Angelus Chevrolet v. State of California* (1981) 115 Cal.App.3d 995; *County of Los Angeles v. Security Ins. Co.* (1975) 52 Cal. App.3d 808.)

The judgment is affirmed.

Newsom, J., and Holmdahl, J., concurred.

APPENDIX B

ORDER DENYING REVIEW
AFTER JUDGMENT BY THE COURT OF APPEAL
1st District, Division 1, No. A034516
S003657

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

GUINNANE et al.

v.

CITY AND COUNTY OF SAN FRANCISCO et al.

Appellants' petition for review DENIED.

LUCAS
Chief Justice

No. 87-1991

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

ROY GUINNANE, GUINNANE CONSTRUCTION CO., INC.,
Petitioners,

VS.

CITY AND COUNTY OF SAN FRANCISCO,
ROBERT PASSMORE, AND ALEC BASH,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA

LOUISE H. RENNE
City Attorney
Counsel of Record

ANDREW W. SCHWARTZ
Deputy City Attorney
214 Van Ness Avenue
San Francisco, CA 94102
(415) 864-2036
Attorneys for Respondents

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

12 pp

TABLE OF CONTENTS

	Page
Statement of the Case	1
Reasons Why The Petition Should Be Denied	3
The Court Below Correctly Decided That *First English* Does Not Apply Because Petitioners Failed To Establish A Compensable Taking	3
A. Because The City Had Not Acted On Petitioners' Building Permit Application At The Time Summary Judgment Was Entered, Petitioners' Claim For A Permanent Taking Is Not Ripe	4
B. Because The Undisputed Facts Show That Petitioners Were Responsible For Any Delay In Processing Their Building Permit Application, The City Did Not Temporarily Take Petitioners' Property	8
Conclusion	9

TABLE OF AUTHORITIES

Cases

	Page
Agins v. City of Tiburon, 24 Cal.3d 266 (1979)	3
Andrus v. Allard, 444 U.S. 51 (1979)	7
First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 482 U.S. ____, 107 S.Ct. 2378 (1987)	passim
Friends of Mammoth v. Board of Supervisors, 8 Cal.3d 247 (1972)	6
MacDonald, Sommer & Frates v. Yolo County, 477 U.S. ____, 106 S.Ct. 2561 (1986)	5, 6
No Oil, Inc. v. City of Los Angeles, 13 Cal.3d 68 (1974)	6, 9
Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978)	3, 6
Ruckleshaus v. Monsanto Co., 467 U.S. 986 (1984)	6
Selby Realty Co. v. City of San Buenaventura, 10 Cal.3d 110 (1973)	8
Verdugo Woodlands Homeowners, etc. Assn. v. City of Glendale, 179 Cal.App.3d 696 (1986)	8
United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985)	6
Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)	3
Williamson Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985)	5

Statutes and Rules

California Administrative Code:	
§ 15074	9
§ 15091	9
§ 15092	9
California Public Resources Code:	
§§ 21000 *et seq.*	5
§ 21001.1	9
Rule 17.1 of the Rules of the Supreme Court	2

No. 87-1991

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

ROY GUINNANE, GUINNANE CONSTRUCTION CO., INC.,
Petitioners,

VS.

CITY AND COUNTY OF SAN FRANCISCO,
ROBERT PASSMORE, AND ALEC BASH,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA

Respondents City and County of San Francisco, Robert Passmore, and Alec Bash ("the City") file this brief in opposition to the Petition for a Writ of Certiorari and pray that the Writ be denied. The California Court of Appeal has correctly determined that in this case there is neither a permanent nor a temporary taking of property requiring just compensation to petitioners.

STATEMENT OF THE CASE

There is no permanent taking in this case for a simple reason: The City has not denied petitioners any use of their property. As the undisputed facts show (*see* Opinion of Court of Appeal attached as Appendix A to Petition for Writ ("Opinion") at A-11), petitioners' original building permit application was cancelled in 1983 "due to [their] failure to submit the requested data." Opinion at A-3. Nearly three years later, on December 30, 1985, petitioners filed a second permit application. In Febru-

ary 1986, when the "city's motion for summary judgment came on for hearing . . . , [petitioners'] new building permit application had not yet been acted upon." Opinion at A-3. Accordingly, under recent decisions of this Court, the Court of Appeal correctly concluded that petitioners' permanent "taking" claim was not ripe for adjudication.

Even if the record showed that the City had denied petitioners' second building permit application, the denial would have stopped only one use of the property. As the Court of Appeal made clear, other uses of the property would still be available.

> The denial of plaintiff's application to build four 5-bedroom, 5-bath houses of 6,000 square feet each, if it has occurred, does not constitute a denial of all use of the land. The denial of an ability to exploit a property interest heretofore believed available for development is not a taking.

Opinion at A-7, n. 4. Petitioners have made no showing that the City has denied uses of the property for houses smaller than 6,000 square feet or for other less intense development.

Petitioners also failed to demonstrate a temporary taking compensable under *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. ____, 107 S.Ct. 2378 (1987) ("*First English*"). Petitioners did not establish that the City denied them all use of their property for any period beyond that required for the normal governmental decision-making process. *See First English*, 107 S.Ct at 2389. Indeed, as the Court of Appeal held, the undisputed facts show that petitioners—and not the City—were responsible for any unreasonable delays in processing their building permit application. Opinion at A-10.

Thus, petitioners have failed to satisfy the provisions of Supreme Court Rule 17.1 governing review on certiorari. Subsections (a) and (b) have no application here: This case involves no decision by a federal court of appeals, and petitioners do not contend that a state court of last resort has decided a federal question in a way that conflicts with decisions of either a federal court of appeals or another state court of last resort. The only remaining basis for review, Rule 17.1(c), is also inapplicable. The Court of Appeal's decision is fully consistent with the decisions of

this court in *First English* and *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). This case is therefore unworthy of review.

To correct inaccuracies and omissions in petitioners' statement of the case, the City incorporates by reference the Factual Background in the Court of Appeal's Opinion, including the court's recitation of the "salient sequence of events" of the case. Opinion at A-10, n.6.

REASONS WHY THE PETITION SHOULD BE DENIED

THE COURT BELOW CORRECTLY DECIDED THAT *FIRST ENGLISH* DOES NOT APPLY BECAUSE PETITIONERS FAILED TO ESTABLISH A COMPENSABLE TAKING

First English overruled the holding in *Agins v. City of Tiburon*, 24 Cal.3d 266 (1979), disallowing money damages for a "taking" resulting from excessive governmental regulation. However, *First English* changed only the *remedy* for a taking. 107 S.Ct. at 2388. It did not change the standard of *liability* for a taking. 107 S.Ct. at 2384-2385. *First English* follows the well established doctrine that a taking occurs only when government action deprives the owner of *all* viable economic use of his property:

> We accordingly have no occasion to decide whether the ordinance at issue actually denied appellant all use of his property or whether the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as a part of the State's authority to enact taking regulations. These questions, of course, remain open for decision on the remand we direct today.

First English, 107 S.Ct. at 2384-2385 (footnote and citations omitted); *accord, Penn Central Transp. Co. v. New York City, supra*, 438 U.S. at 130-131; *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

Consistent with this holding, in this case the Court of Appeal stated:

> Although the Supreme Court has determined that a temporary regulatory taking is compensable, there is nothing in *First English* which changes the rule that a "taking" must occur before compensation may be claimed.

Opinion at page A-6. Here, the Court of Appeal separately analyzed and rejected petitioners' claims that a permanent and a temporary taking had occurred. Each ruling was correct.

A

BECAUSE THE CITY HAD NOT ACTED ON PETITIONERS' BUILDING PERMIT APPLICATION AT THE TIME SUMMARY JUDGMENT WAS ENTERED, PETITIONERS' CLAIM FOR A PERMANENT TAKING IS NOT RIPE

With respect to a permanent taking, petitioners argue that the Court of Appeal's decision was based on its finding that petitioners were not deprived of their right to sell the property or to exclude others from it. Petition at 6-7, referring to Opinion at A-7. In fact, the Court of Appeal based its decision on petitioners' failure to demonstrate any denial of all use of their property. Petitioners have the burden of showing that the government's regulation effected such a denial. *See First English*, 107 S.Ct. at 2384.

The uncontested facts support the Court of Appeal's ruling. Petitioners originally sought a building permit for the subject property in September 1980. The permit was cancelled in May 1983 as a result of petitioners' inaction. *See* Opinion at A-3. Petitioners waited to file a second building permit application until December 30, 1985. As of February 4, 1986, the date summary judgment was entered for the City, petitioners' second building permit application had been on file for only five weeks and *was still pending*. Therefore, on the record at the time of the summary judgment ruling, the trial court correctly held that the

City had not denied petitioners any use of their property. Opinion at A-7, 8.

The Court of Appeal correctly based its holding that petitioners' taking claim was premature on authority from this Court. Opinion at A-7. In *First English*, this Court discussed cases like this one in which the taking issue was not ripe.

> Concerns with finality left us unable to reach the remedial question in the earlier cases where we had been asked to consider the rule of *Agins*. *See MacDonald, Sommer & Frates, supra*, 477 U.S., at ____; (summarizing cases). In each of these cases, we concluded either that the regulations considered to be in issue by the state court did not effect a taking, *Agins v. Tiburon, supra*, 24 Cal.3d, at 263, or that the factual disputes yet to be resolved by state authorities might still lead to the conclusion that no taking had occurred. *MacDonald, Sommer & Frates, supra*, 477 U.S., at ____; *Williamson County, supra*, 473 U.S., at ____; *San Diego Gas & Electric Co., supra*, 450 U.S., at 631-632. Consideration of the remedial question in those circumstances, we concluded, would be premature.

107 S.Ct. at 2383.

In *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) and *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. ____, 106 S.Ct. 2561 (1986), this Court squarely held that a taking claim is premature where the government has not made a final decision rejecting a development plan and denying a variance. *Williamson*, 473 U.S. at 191-193; *MacDonald*, 106 S.Ct. at 2568. In this case, the record uniquivocally shows that the City had not made a final decision.

Even if petitioners' taking claim were ripe, it would fail. Petitioners claim is that the City's permit requirements and requirements for environmental information under California's Environmental Quality Act ("CEQA"), California Public Resources Code §§ 21000 *et seq.*, were so onerous that they effectively precluded development. With respect to the City's permit process, it is clear that requiring a developer to undergo such a permitting process before proceeding with development is not a

taking. As this Court declared in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127 (1985):

> A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself "take" the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired. Moreover, even if the permit is denied, there may be other viable uses available to the owner. Only when a permit is denied and the effect of the denial is to prevent "economically viable" use of the land in question can it be said that a taking has occurred.

On the record in this case, petitioners have shown neither that a permit was denied or that they were prevented from making any economically viable use of the land in question.

With respect to the City's requirements for environmental information, petitioners' claim fails under the substantive test of *Penn Central, supra.* Under that test, courts examine three factors: (1) the extent to which the government action interferes with reasonable, investment-backed expectations; (2) the economic impact of the government regulation; and (3) the character of the government action, *i.e.*, whether there is a physical invasion. 438 U.S. at 124; *see also MacDonald, Sommer & Frates v. Yolo County, supra*, 106 S.Ct. at 2566.

As to the first factor, petitioners had no reasonable investment-backed expectation that the City would not require environmental information to satisfy CEQA before permitting development. A reasonable expectation "must be more than a 'unilateral expectation or an abstract need.' " *Ruckleshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984). The City's environmental review process has been mandatory under state law for 17 years. *See No Oil, Inc. v. City of Los Angeles*, 13 Cal.3d 68, 83-84 (1974); *Friends of Mammoth v. Board of Supervisors*, 8 Cal.3d 247, 254 (1972). Petitioners have presented no evidence or authority that the state-mandated requirements for environmental information were unexpected, unreasonable, or excessive.

As to the second factor, the economic impact of the City's requirement that petitioners supply environmental information was nil. Petitioners still own exactly what they bought, and own it at a greatly enhanced value. Petitioners purchased the property for $210,000 in 1979, and petitioners' expert valued the property at $1,500,000 in 1985 assuming that the property could be developed. Opinion at A-7, n. 3. Thus, the only evidence in the record is that the value of petitioners' property *increased* over 600 percent.*

As to the third factor, the City did not physically invade petitioners' property. Rather, any interference with petitioners' free use of the property arose from CEQA. The mere fact that state law requires petitioners to supply environmental information before their permit could be processed is not sufficient to establish a taking:

> [T]he denial of one traditional property right does not always amount to a taking. . . . [W]here an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking, because the aggregate must be viewed in its entirety.

Andrus v. Allard, 444 U.S. 51, 65-66 (1979). CEQA is a burden "we all must bear in exchange for 'the advantage of living and doing business in a civilized community.' " *Id.*, at 67.

Finally, petitioners' claim that the demands for environmental information were impossible to satisfy is completely undercut by the record. The evidence shows that petitioners ultimately provided all the necessary information, and that the environmental review process was completed nearly five months before the trial court ruled in this matter.

The lower court's decision turns on the peculiar facts of this case and is consistent with a long line of authorities of this Court. Therefore, the petition should be denied.

---

* In contrast, the record in the court below demonstrates that petitioners' total cost for environmental review of their project was only $18,200. Clerk's Transcript 812-813, 826-827, 833, 834, 839, 841-842, 867.

B

BECAUSE THE UNDISPUTED FACTS SHOW THAT PETITIONERS WERE RESPONSIBLE FOR ANY DELAY IN PROCESSING THEIR BUILDING PERMIT APPLICATION, THE CITY DID NOT TEMPORARILY TAKE PETITIONERS' PROPERTY

During the period July 1980 to July 1981, the City designated petitioners' property as "open space" in its Master Plan. Petitioners allege that "all acknowledge" that they could not develop their property during this one-year period. Petition at 9. On the contrary, the City does not agree with this assertion and the Court of Appeal did not so hold.

Indeed, California law does not support petitioners' claim. Designation of property as open space in a city's master plan means merely that the city intends to study acquisition of the property for open space. The City's open space Master Plan designation of petitioners' property did not prevent its development. California cases establish that development of property may proceed despite such designation. *See Verdugo Woodlands Homeowners, etc. Assn. v. City of Glendale*, 179 Cal.App.3d 696, 704 (1986) (charter city is free to permit development not in conformance with master plan); *Selby Realty Co. v. City of San Buenaventura*, 10 Cal.3d 110, 119-120 (1973) (adoption of a master plan amendment is for planning purposes only and does not interfere with development).

Even if the one-year open space designation did preclude development, the Court of Appeal correctly concluded that any "interim delay which occurred herein while the City studied the possible acquisition of plaintiff's property as an open space area" was a "*normal delay* in obtaining [a] building permit." Opinion at A-9; emphasis added. *First English* makes clear that such normal delays cannot constitute a taking. 107 S.Ct. at 2389.

Moreover, even assuming *arguendo* that the one-year open space designation was not a "normal delay," petitioners' claim would fail; the one-year wait did not prejudice petitioners because even after it expired, they then delayed for more than three years

in completing environmental review. As the Court of Appeal stated:

> Notwithstanding city's repeated requests for the essential information, some three and one-half years expired before plaintiff submitted the final item of information (the site survey) in September 1985.

Opinion at A-10, n. 6. The following month, the City completed the environmental review process. *Id.* Because completion of environmental review is a prerequisite to issuance of a building permit under California law, the City was not the legal cause of any alleged delay in the City's issuing a building permit. California Public Resources Code § 21001.1; California Administrative Code §§ 15074(b), 15091(a), 15092; *No Oil, Inc. v. City of Los Angeles, supra*, 13 Cal.3d at 84. It was petitioners' "own conduct and inaction," not the City's, which was the legal cause of any excessive delay in formal action on petitioners' building permit. Opinion at A-10.

CONCLUSION

The record establishes that there was neither a permanent nor a temporary taking in this case. The petition for a writ of certiorari should be denied.

Dated: August 31, 1988

Respectfully submitted,

LOUISE H. RENNE
City Attorney
Counsel of Record

ANDREW W. SCHWARTZ
Deputy City Attorney

By ANDREW W. SCHWARTZ
Counsel for Respondents